No. 10,087

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MINNIE L. WHITTHORNE and EVA WHITTHORNE, Executrices of the Estate of W. R. Whitthorne, Deceased,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

and

SHERWOOD SWAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

OPENING BRIEF OF PETITIONERS-APPELLANTS.

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OPENING BRIEF OF PETITIONERS-APPELLANTS.

The above entitled cases were consolidated for trial before the Board of Tax Appeals and consolidated for appeal before this Court inasmuch as they involved identical issues arising out of the same state of facts.

The Sherwood Swan case involves a proposed additional tax of $43,381.44 for 1936 and a penalty for delinquent filing of $2,242.74 and the Whitthorne case

involves a proposed additional tax for 1936 of $9,812.45 and a penalty for delinquent filing of $495.12. Shortly before the trial Whitthorne died and the executrices of his estate were substituted as parties petitioner.

STATEMENT OF FACTS.

In 1930 and for some time prior thereto Sherwood Swan and W. R. Whitthorne had been associated together in business activities of a mercantile nature in the City of Oakland. They were in March, 1930 and for some time had been the owners (one-half each) of 1,000 shares of the capital stock of Sherwood Swan and Company, Ltd., being all the issued capital stock of that company. Sherwood Swan and Company, Ltd. operated a market in the City of Oakland commonly known as the Tenth Street Market. (Findings Tr. p. 78.)

Messrs. Swan and Whitthorne were in March 1930 and for some time had been indebted in amounts far in excess of their assets as follows:

A. To Harrison S. Robinson for money loaned to them in the sum of $35,000 represented by their joint and several promissory note secured by their pledge of said 1,000 shares of the stock of Sherwood Swan and Company, Ltd.

B. To Central National Bank of Oakland for money loaned to them as follows:

	Swan	Joint and Several	Total
Unsecured	$20,000		
Secured by the pledge of 6,000 shares of Hale Bros. Stores, Inc.		$250,000	$270,000

C. To Bank of America for moneys loaned to them as follows:

	Swan	Joint and Several	Total
Unsecured	$65,000		
Secured by the pledge of 2171 shares of Hale Bros. Realty Co.		$100,000	
Secured by a mortgage on a ranch in Madera County having a value of approximately $6,000	$10,000		$175,000

D. To Davis S. Wasserman $100,000, balance of purchase price of Wasserman-Gattmann business secured by the pledge of 1,000 shares of Wasserman-Gattman Co. (Findings Tr. p. 78.)

In March, 1930, Swan's assets consisted of the following items:

(i) An account receivable due from Wasserman-Gattmann Co. in the amount of $2,425.55;

(ii) 500 shares of Sherwood, Swan and Company, Ltd.;

(iii) 2,071 shares of Hale Bros Realty Co.;

(iv) 1,725 shares of Wasserman-Gattmann Co.;

(v) 2,000 shares of Swan's (a corporation); and

(vi) A ranch situated in Madera County, California.

(Tr. p. 42; Swan Petition V-1.)

Petitioner Whitthorne's assets on that date consisted of the following items:

(i) An account receivable due from Sherwood Swan and Company, Ltd., in the amount of $5,506.09;

(ii) 500 shares of Sherwood Swan and Company, Ltd.;

(iii) 6,000 shares of Hale Bros. Stores, Inc.;

(iv) 1,725 shares of Wasserman-Gattmann Co.; and

(v) 2,000 shares of Swan's (a corporation).

(Tr. p. 10; Whitthorne Petition V-1.)

Steps were taken whereby the banks (Central National Bank and Bank of America) caused to be paid to Harrison S. Robinson the $35,000 principal and accrued interest on the note due to him from Sherwood Swan and W. R. Whitthorne. Thereupon the 1000 shares of stock of Sherwood Swan and Company, Ltd. theretofore pledged to Harrison S. Robinson were released and were pledged 500 shares to the Central National Bank of Oakland and 500 shares to Bank of America. (Findings Tr. p. 78; Testimony of Robinson, Tr. p. 108.)

At the time of such pledging, to-wit, in March, 1930, at a meeting at which there were present Sherwood Swan, Harrison S. Robinson, his attorney, Oscar

L. Cox, Vice President of Bank of America, J. W. Carlston, President of Central National Bank, and James A. Wainwright, Vice President of the Central National Bank, it was agreed on behalf of each bank by its responsible officers that if said Sherwood Swan and W. R. Whitthorne should reimburse the banks for the $35,000 and interest advanced by the banks to pay off Mr. Robinson and should at any time pay to each bank the sum of $100,000 on account of their obligations to such bank, the two lots of 500 shares each of stock of Sherwood Swan and Company would be released from pledge and would be freed from further pursuit in any form by such banks on account of the obligations of Sherwood Swan and W. R. Whitthorne to the banks. The banks were subsequently reimbursed for the $35,000 and interest so advanced by them to pay to Robinson. (Findings Tr. pp. 78-9; Testimony of Robinson, Tr. pp. 108-9.)

This agreement was confirmed by letters from the banks' officers. (Tr. pp. 185-201; Petitioners' Ex. 1-8, inc.)

Sherwood Swan and W. R. Whitthorne were not able to make the required payments to secure the release of their Sherwood Swan and Company (commonly known as the Tenth Street Market) stock until December 16, 1936. In that month the following transactions took place:

1. Sherwood Swan and W. R. Whitthorne borrowed from the Anglo California National Bank the sum of $175,000.

2. Bank of America caused to be conducted a pledgee's sale of the pledged assets in its hands and disposed of the same at such sale as follows:

a. To Sherwood Swan and W. R. Whitthorne 500 shares of the stock of Sherwood Swan and Company for $100,000, such $100,000 being a portion of the $175,000 borrowed by them from The Anglo California National Bank.

b. To Bank of America the remaining assets pledged to it, to-wit, 2071 shares of stock of Hale Bros. Realty Co., 1,000 shares of Swan's, a corporation, and 1722 shares of Wasserman-Gattmann Co., a corporation, for $96,073.14, being the balance then due from Sherwood Swan and W. R. Whitthorne to said bank. (Findings Tr. pp. 79-80; Petitioners' Ex. 15; Tr. pp. 213-217.)

3. The receiver of Central National Bank, with the approval of the United States District Court, and the Comptroller of Currency received from Sherwood Swan and W. R. Whitthorne $75,000 cash and their joint and several non-interest bearing promissory note for $20,000, payable $4000 per year, and in consideration thereof released to Sherwood Swan and W. R. Whitthorne from pledge 500 shares of the stock of Sherwood Swan and Company, Ltd. and discharged Sherwood Swan and W. R. Whitthorne from liability on their notes to said Central Bank. (Findings Tr. p. 79; Petitioners' Exs. 13, 14; Tr. pp. 205-213.)

4. Sherwood Swan and W. R. Whitthorne caused a corporate reorganization of Sherwood Swan and Company, Ltd. to be carried out whereby the 1,000 shares

of its capital stock heretofore referred to were cancelled and in lieu thereof there was issued to Sherwood Swan and W. R. Whitthorne 30,000 shares of Class A Preferred stock of $10,000 par value and 45,000 shares of Common stock of no par value. (Findings Tr. pp. 81-82.)

On December 16, 1936, after the steps just recited and immediately prior to the marketing of the preferred stock referred to in the succeeding paragraph, the assets and liabilities of Swan consisted of the following items (using as a basis for valuing the Sherwood Swan and Company, Ltd. stock the selling price of its Class A stock):

ASSETS

Current assets:		
Due from Sherwood Swan and Company, Ltd.		$ 9,835.12
Investments:		
Sherwood Swan and Company, Ltd. capital stock—500 shares—fair market value (exchanged on December 16, 1936 for 15,000 Class A shares having fair market value of $7.00 per share and 22,500 shares common stock with no market value)	$105,000.00	
Ranch situated in Madera County, California—held under mortgage by Bank of America (contra)—approximate market value	6,000.00	111,000.00
		$120,835.12

LIABILITIES

Current Liabilities:		
Notes payable—		
Bank of America—secured by first mortgage on ranch situated in Madera County, California (contra)	$ 10,000.00	
Central Company (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne totaling $20,000)	10,000.00	
Anglo California National Bank (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne in the respective total sums of $175,000 and $5,000)	90,000.00	
David S. Wasserman	5,000.00	115,000.00
Accounts payable—		
Helen L. Swan	4,788.00	
Charles Raphael	500.00	
Harry Camp	7,500.00	
Orrick, Palmer & Dahlquist (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne totaling $2,000)	1,000.00	
T. E. Louis	725.10	
R. L. Underhill	200.00	
George D. Roberts	500.00	
McKinstry, Haber & Pierce Coombs	300.00	
Moose Club	58.50	15,571.60
Accrued taxes—		
Federal income taxes on 1936 income except that on sale of Sherwood Swan & Company, Ltd. stock and alleged gain on discharge of bank indebtedness	620.78	
California state income taxes on 1936 income accrued to December 16, 1936 (based upon same inclusions as federal tax)	143.57	764.35
SHERWOOD SWAN—NET INSOLVENCY		*10,500.83*
		$120,835.12

(Findings Tr. p. 81; Petitioner Swan's Ex. 10; Tr. pp. 203-4.)

On December 16, 1936, immediately prior to the marketing of the preferred stock referred to in the succeeding paragraph, the assets and liabilities of Whitthorne consisted of the following items (using as a basis of valuing the Sherwood Swan and Company, Ltd. stock, the selling price of its Class A stock):

ASSETS

Investment:	
Sherwood Swan and Company, Ltd. capital stock—500 shares—fair market value (exchanged on December 16, 1936 for 15,000 Class A shares having fair market value of $7.00 per share and 22,500 shares common stock with no market value)	$105,000.00

LIABILITIES

Current Liabilities:			
Notes Payable—			
Central Company (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne totaling $20,000)	$10,000.00		
Anglo California National Bank (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne in the respective total sums of $175,000 and $5,000)	90,000.00	100,000.00	
Accounts Payable—			
Orrick, Palmer & Dahlquist (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne totaling $2,000)	1,000.00		
George D. Roberts	500.00	1,500.00	101,500.00
	NET WORTH		$ 3,500.00

(Findings Tr. p. 81; Testimony of Swan, Tr. pp. 141-143.)

In addition Whitthorne was contingently liable for Swan's half of the $20,000 joint and several note to Central Company and Swan's half of the $180,000 notes to the Anglo California National Bank. Since Swan was insolvent (see his statement of Assets and Liabilities, supra), these contingent liabilities may be properly considered in determining Whitthorne's solvency. Giving such consideration, they more than wipe out his net worth of $3500.

5. Sherwood Swan and W. R. Whitthorne entered into an agreement on November 16, modified on December 16, 1936, with Robert N. Miller & Co. whereby Sherwood Swan and W. R. Whitthorne agreed to sell and Robert N. Miller & Co. agreed to buy from them $25,000 of the Class A shares for $7.00 per share or a total purchase price of $175,000. This agreement and the purchase price moneys to be paid thereunder were pledged by Sherwood Swan and W. R. Whitthorne to the Anglo California National Bank to secure the payment of the $175,000 note referred to in paragraph No. 4 above. (Finding Tr. p. 82.)

There was no sale of the old stock of Sherwood Swan and Company, Ltd. prior to the reorganization thereof on December 16, 1936. There was no sale or transfer of the common stock of Sherwood Swan and Company, Ltd. after the reorganization, except a single transaction whereby Swan acquired 4500 shares of said stock from Whitthorne in consideration of which Swan assumed Whitthorne's half of the liability under the $20,000 non-interest bearing note executed by Swan and Whitthorne on December 16, 1936 to the Central National Bank. The value of said obligation assumed by Swan as of the date of such transfer, to-wit, May 18, 1937 was $8618.48. (Tr. p. 221; Petitioners' Exhibit 21.) The transaction was entered into because Mr. Whitthorne as the much senior in age of the two business associates wanted Mr. Swan as the younger man to increase his holdings of the common stock from 50% to 60% which would give him substantial control of the company and Swan

wanted to assume the liability. They did not discuss values. (Findings Tr. p. 83; Testimony of Swan, Tr. pp. 145-6.)

There have never been any sales or other transfers of the common stock or any offers thereof for sale or any bids therefor. (Findings Tr. p. 83.)

The income tax returns of Swan and wife and Whitthorne and wife (consisting of formal blanks and a twelve-page memoranda setting forth in detail the various transactions of December, 1936, hereinbefore referred to) were prepared by Frank G. Short, Certified Public Accountant, partner in Barrow, Wade, Guthrie & Co. in the period between March 18, 1937 and May 29, 1937. The returns showed no tax due from either Swan or Whitthorne. Mr. Short procured an extension of time to file such returns to April 15th and a second extension of time to June 1, 1937. He worked fairly continuously on the task during that period. The returns were finished on Saturday, May 29, 1937 and delivered to Swan in San Francisco on the next business day, Tuesday, June 1, 1937. The four returns were notaried on June 1, 1937, a check for one-half the tax shown by Mrs. Swan's return to be due from her was drawn by Sherwood Swan and Company on June 1, 1937 (Test. Short, Tr. pp. 167-169), Mr. Swan took the returns on June 1 to the Internal Revenue Office in the Post Office Building, Oakland, and filed them by slipping them through the slot in the door of the Deputy Collector's office. (Test. Swan, Tr. pp. 179-180.)

STATEMENT OF THE POINTS UPON WHICH PETITIONERS RELY.

I. By the March, 1930 agreement, the banks released the Sherwood Swan and Company, Ltd. stock from pursuit except to the amount of $100,000 to each bank, thus immediately freeing that stock from all demands in excess of $200,000, and thus any gain occasioned by such freeing of assets took place in 1930.

II. Any income to petitioners incident to the freeing of assets occasioned by the cancellation of indebtedness cannot exceed the cost basis of such assets to taxpayer.

III. Using cost as the proper valuation of the assets freed, petitioners did not receive any taxable income incident to the freeing of such assets by the cancellation of indebtedness.

IV. Any income to petitioners incident to the release of assets occasioned by the cancellation of indebtedness cannot exceed the net fair market value of the assets so released.

V. Using the fair market value basis, petitioners did not receive any taxable income incident to the freeing of assets by the cancellation of indebtedness.

VI. The entire cost to petitioners of the Sherwood Swan and Company stock should be applied as the basis for the Class A preferred stock sold by them rather than simply an allocated percentage thereof.

VII. There was reasonable cause for the apparent one-day delay of petitioners in the filing of their returns.

ARGUMENT.

I. BY THE MARCH, 1930 AGREEMENT, THE BANKS RELEASED THE SHERWOOD SWAN AND COMPANY, LTD. STOCK FROM PURSUIT EXCEPT TO THE AMOUNT OF $100,000 TO EACH BANK, THUS IMMEDIATELY FREEING THAT STOCK FROM ALL DEMANDS IN EXCESS OF $200,000, AND THUS ANY GAIN OCCASIONED BY SUCH FREEING OF ASSETS TOOK PLACE IN 1930.

Three of the points which will be argued in this brief deal with the so-called "cancellation of indebtedness" rule. Hence, it will be necessary to enter into a preliminary discussion of that rule and of the basis for it.

A great deal of confusion has been occasioned by the unqualified statement sometimes made that income accrues to the debtor from the cancellation of his indebtedness. Cancellation of indebtedness does not *per se* constitute income to the debtor. The income arises rather from the freeing of assets in the hands of the debtor which previously were subject to the claims of the creditors, but which by the settlement or cancellation are now freed therefrom.

The true theory upon which the rule is based is well explained by Professor Magill in Chapter 7 of his work on *Taxable Income,* beginning on page 226.

In *Dallas Transfer and Terminal Warehouse Co. v. Commissioner* (C. C. A. 5), 70 Fed. (2d) 95, the Court spoke of the situation before it as one where:

> "There is a reduction or extinguishment of liabilities without any increase of assets."

The Court thus distinguished *U. S. v. Kirby Lumber Co.,* 284 U. S. 1:

> "The decision that the increase in clear assets so brought about constituted taxable income is not applicable to the facts of the instant case, as the cancellation of the respondent's past due debt to its lessor did not have the effect of making the respondent's assets greater than they were before that transaction occurred. Taxable income is not acquired by a transaction which does not result in the taxpayer getting or having anything he did not have before."

The necessity for there being a freeing of assets from the claims of creditors was emphasized by the Board in *Madison Railways Company v. Commissioner,* 36 B. T. A. 1106, where the Board said:

> "If in this proceeding the purchase and retirement of the petitioner's bonds at less than the issuing price had resulted in making the petitioner solvent, we would have been constrained to hold that the petitioner had derived taxable income from the transaction, at least to the extent that its assets were freed from claims of creditors."

The rule should more properly be stated as "the release of assets" rule rather than "the cancellation of indebtedness" rule. We will have occasion hereafter to again refer to this distinction in each of the next succeeding three points.

Our first point deals with the relationship between what we will describe as the "Agreement Not to Pursue" of March, 1930 and the "Release of Indebtedness Agreement" of December, 1936.

In March, 1930, the petitioners Swan and Whitthorne were insolvent. They were indebted to Wasserman in the sum of $100,000 for the purchase of stock in Wasserman-Gattmann Co. They were heavily indebted to two banks—to the Central National Bank in the sum of $270,000 and to the Bank of America in the sum of $175,000. Their only asset which would ever enable them to work out of difficulty was 1000 shares (the entire capital stock) of Sherwood Swan and Company, which operated a produce market in the City of Oakland commonly known as the "Tenth Street Market". This stock, in March, 1930, and for some years past, had been pledged by them to Harrison S. Robinson to secure their joint note for $35,000. The banks wanted this stock as security for their loans and accordingly arranged to and did pay Mr. Robinson off and took a pledge of the stock, 500 shares to each bank. However, at the same time the banks recognized that in order to induce Swan and Whitthorne to endeavor to work themselves out of this difficulty they must hold out to the debtors inducements that upon some agreed terms they would ultimately receive their stock in the Market freed from claims of the banks. Accordingly it was agreed by the two banks on the one hand, and Messrs. Swan and Whitthorne, on the other, in March of 1930, that when the banks should be reimbursed for the $35,000 they paid to Mr. Robinson and should each receive the sum of $100,000, the stock in the Tenth Street Market would be released from further pursuit by the banks. In other words, the banks would look to the

stock only for $235,000. They were shortly reimbursed for the $35,000, leaving the figure at $200,000.

It is not our contention that the March, 1930, agreement itself constituted a complete cancellation of the indebtedness. Hence, *Walker v. Commissioner,* 88 Fed. (2d) 170, is not in point.

But we do contend that the March, 1930 agreement did have a very real effect in determining from what debts the Tenth Street Market stock was freed. All that the *Walker* case decided was that the date of the cancellation of indebtedness, or to put it the other way, the date of the freeing of the stock was the date of consummation of the transaction and not the date the contract was made. That is not the problem here.

What we contend is that while the March, 1930, agreement did not itself constitute a complete cancellation of any indebtedness so far as the *personal liability* of Messrs. Swan and Whitthorne was concerned, it did constitute an agreement that this particular asset—the stock of Sherwood Swan and Company—would not be pursued for anything in excess of $200,000—$100,000 to each of the two banks.

We come then to what transpired in December, 1936. The Receiver for the Central National Bank upon receipt of $95,000 ($75,000 cash and a $20,000 note) released its 500 shares to Messrs. Swan and Whitthorne and cancelled all their notes. So far as the *personal responsibility* of Swan and Whitthorne was concerned, this constituted a release of all their old indebtedness to the Receiver of that bank. But

so far as the *stock* was concerned, it had already been freed from pursuit as to all indebtedness except $100,000. Thus by this transaction it was only freed from $5000 of indebtedness—the difference between $100,000 agreed upon and the $95,000 paid.

So far as the Bank of America is concerned, on December 16, 1936, it sold the Tenth Street Market stock to Messrs. Swan and Whitthorne at pledgee's sale for $100,000 and sold to itself the remaining assets pledged to it at pledgee's sale for an amount equivalent to the balance of the indebtedness from Swan and Whitthorne—$96,073.14.

Under the evidence this did not constitute a cancellation of indebtedness at all; for the bank by its own voluntary act simply acquired the Hale Bros. Realty Co., Swan's and Wasserman-Gattmann Co. stock at pledgee's sale for $96,073.14. It could have cancelled the remaining indebtedness as the Central Bank did, but it elected to purchase the miscellaneous assets for the full balance of its indebtedness, thus leaving nothing to be cancelled. The method in which Bank of America elected to handle the transaction may have resulted in capital gain or loss, depending on the cost of these miscellaneous assets to Swan and Whitthorne, but it certainly did not result in a cancellation of indebtedness, for the bank realized its entire indebtedness by the two parts of the pledgee sale.

However, even if the transaction could be construed to be a cancellation of indebtedness, the Sherwood Swan and Company, Ltd. stock, by the Bank of

America's March, 1930 agreement, had been freed from pursuit except as to the $100,000 agreed to be paid and which was so paid.

The Board of Tax Appeals in the present case confuses the factor in the transaction which is the real benefit to the taxpayer and which results in income to him. We quote the pertinent portion of the opinion of the Board with our comment thereon.

Opinion.	Comment.
The petitioners argue a new conception of the doctrine of realization of income in connection with a debt settlement.	The conception is not "new". As we have shown just above, it has always been present in the authorities.
They say the essence of the realization is not the settlement of the debts alone, but the freeing of assets, and that such freeing of assets occurred in 1930 when the pledge of the shares was limited by the banks to $100,000.	Correct, and thereafter the taxpayer was free to use these assets in his operations, subject only to the burden of $100,000 thereon to each bank. If the banks in 1930 by agreement had *completely* released the market stock from pursuit, then the taxpayers would have had the entire value of such assets to use in their future operations, and thereby would have received income to the extent of such asset so freed. They did receive in 1930 the freedom to use a portion of such value, to-wit, the equity therein in excess of $200,000.
A solvent taxpayer realizes a gain by a reduction of his debt irrespective of whether the debt is secured by a pledge or mortgage.	This statement is correct to the extent that the rule is not limited to the situation where there is a formal pledge or mortgage, but, nevertheless,

Opinion.	Comment.
	there must be assets freed by the transaction from the burden, even though such burden is not a secured one. It is only the newly freed assets which constitute income.
The freeing of assets which has been regarded in the decisions as a significant fact is not the release of the pledged security from lien, but the effect of enabling the debtor to use all his assets freed from the incubus of the debt.	The Board here recognizes that it is the enabling of the debtor to use his assets freed from the incubus of the debt which is the significant fact. However, the Board is in error in referring to the transaction as merely "the release of the pledged security from lien"; here there was much more. There was an agreement not to pursue at all for more than a fixed sum.
The obliteration of the offsetting liability for debt is what constitutes the gain.	This contradicts the preceding sentence. We submit that it is not the obliteration of the offsetting debt liability, but the freeing of assets. For example: If a taxpayer had no assets and his creditors cancelled a part or all of his liabilities, that would not constitute taxable income. That is why the Courts and the Board itself have refused to find any taxable gain where the recipient of the cancellation is insolvent.
If in 1930 the creditor banks had not only agreed to limit the use of the pledged shares security for $100,000 of the debt, but had also renounced	This can be answered by a simple illustration. Suppose a taxpayer has $300,000 of assets and $300,000 of liabilities. In 1930 the creditor releases

Opinion.	Comment.
all claim on the debtor for more than $100,000, the forgiveness would have been a gain, not because the lien was limited, but because the excess amount of the debt was discharged without payment. Having been realized in 1930 it would have been taxable then and not later. But it was not until 1936 that the debt was finally settled; so the resulting gain is properly taxable then.	$200,000 of the assets from all pursuit on his debt. In 1936 the creditor releases the remaining $100,000 of assets from pursuit on the debt. Clearly the taxpayer did not receive his entire benefit in 1936. He benefited to the extent of $200,000, the value of his assets then available to him, in 1930, and he benefited in 1936 to the value of the remaining $100,000 of assets then freed to him. That was the situation here of Whitthorne and Swan. They benefited in 1930 to the extent of the equity in the market stock above $200,000. The only assets which were released to them in 1930 were the comparatively small other assets then owned by them—in Swan's case $9000, and in Whitthorne's, none.

The only way in which a transaction of this character can result in income to the debtor is not by the cancellation of indebtedness, but by the freeing of his assets from the claims of creditors. We have proved that both lots of Sherwood Swan and Company stock were freed in 1930 from all claims in excess of $100,000 each. There being no freeing of assets from claims in 1936, there was no income in that year, except that the Central Bank accepted $95,000 instead of the $100,000 agreed upon.

II. ANY INCOME TO PETITIONERS INCIDENT TO THE RELEASE OF ASSETS OCCASIONED BY THE CANCELLATION OF INDEBTEDNESS CANNOT EXCEED THE COST BASIS OF SUCH ASSETS TO PETITIONERS.

The Board of Tax Appeals, thinking only of its "cancellation of indebtedness" theory, treats the entire amount of the indebtedness to the banks in excess of the $195,000 paid to them as income. But as we have pointed out above, the significant fact is not the amount of *indebtedness cancelled* but the amount of *assets freed* from the claims of such indebtedness. What then is the amount of the assets so "freed"? Clearly the taxpayer cannot be deemed to have received income in excess of the cost or other basis to him of the stock so freed.

It is stipulated that the cost of the Sherwood Swan and Company, Ltd. stock to Messrs. Swan and Whitthorne was $100,000—$50,000 to each. Therefore, the maximum amount which it can be contended Mr. Swan was enriched by freeing this stock to him is $50,000 instead of the $80,009.13 figure used by the Commissioner. This latter figure is the Commissioner's computation of the amount of the cancelled indebtedness, but since such cancelled indebtedness is in excess of the basis of the stock freed, such basis constitutes the maximum amount of Mr. Swan's income on the transaction.

There are two reasons why such cost basis must constitute the maximum amount of income which the taxpayer can be deemed to receive incident to such a transaction:

(a) **The income tax statute deals only with realized gains.**

Any purported gain which it might be contended the taxpayer received by the transaction in excess of cost would be an unrealized gain.

Assume by way of illustration that this stock originally cost Mr. Swan $50,000; that its fair market value at the date of the cancellation of indebtedness in 1936 had risen to $100,000, but that subsequently, when Mr. Swan disposes of it, it has shrunk to $75,000. Clearly, there would be no realization of any $50,000 increment in value between the date Mr. Swan acquired the stock and 1936 when it was freed from the burden of the indebtedness by the cancellation. There was a temporary increment in value in the illustration just used, but that increment had nothing to do with the cancellation transaction any more than the shrinkage in value which we assume in the illustration as occurring subsequently.

The argument we are making, which is given point by the illustration just used, is that the only theory under which taxable income can be deemed to have accrued by reason of the transaction is that the asset long owned, but until now by reason of the creditor's claim not free for use, is now free. So all that the taxpayer has received is the freedom to use the asset which he has always owned and such asset should be treated in his hands for income computation purposes at its cost basis.

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It is stipulated that the cost of the Sherwood Swan and Company, Ltd. stock to Messrs. Swan and Whitthorne was $100,000—$50,000 to each. Therefore, the maximum amount which it can be contended Mr. Swan was enriched by freeing this stock to him is $50,000 instead of the $80,009.13 figure used by the Commissioner. This latter figure is the Commissioner's computation of the amount of the cancelled indebtedness, but since such cancelled indebtedness is in excess of the basis of the stock freed, such basis constitutes the maximum amount of Mr. Swan's income on the transaction.

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(a) The income tax statute deals only with realized gains.

Any purported gain which it might be contended the taxpayer received by the transaction in excess of cost would be an unrealized gain.

Assume by way of illustration that this stock originally cost Mr. Swan $50,000; that its fair market value at the date of the cancellation of indebtedness in 1936 had risen to $100,000, but that subsequently, when Mr. Swan disposes of it, it has shrunk to $75,000. Clearly, there would be no realization of any $50,000 increment in value between the date Mr. Swan acquired the stock and 1936 when it was freed from the burden of the indebtedness by the cancellation. There was a temporary increment in value in the illustration just used, but that increment had nothing to do with the cancellation transaction any more than the shrinkage in value which we assume in the illustration as occurring subsequently.

The argument we are making, which is given point by the illustration just used, is that the only theory under which taxable income can be deemed to have accrued by reason of the transaction is that the asset long owned, but until now by reason of the creditor's claim not free for use, is now free. So all that the taxpayer has received is the freedom to use the asset which he has always owned and such asset should be treated in his hands for income computation purposes at its cost basis.

(b) **To use any value greater than cost as the basis for computing the profit on the release of assets would result in double taxation.**

The income tax statute does not specifically forbid double taxation. Nevertheless, it has been frequently held that equity will so construe the act as to prevent double taxation where possible, and that double taxation is not permitted to be imposed against a single taxpayer arising out of a single transaction.

U. S. v. Supplee Biddle Hardware Co., 265 U. S. 189, at page 196.

In *U. S. v. Ludey,* 274 U. S. 295, at page 301, it was held that the act would be construed as not to permit a double deduction for the loss of the same capital asset. Similarly, the act should be so construed as not to permit a double taxation upon the same increment in value.

The rule is well illustrated by the two steps which the Commissioner has attempted to take here:

1. Under his "cancellation of indebtedness" theory, the Commissioner is requiring Mr. Swan to pay a tax on a gain of $80,009.13 with respect to property that cost him $50,000.

2. In computing the gain on the sale of this stock by Mr. Swan on the same day, the Commissioner uses not the $170,009.13 minus $50,000.00, or $80,009.13 figure, upon the basis of which he computed the gain in the first step, but he goes back to the original $50,000 and uses an allocated portion of that, to-wit, 84% of $50,000.

Clearly, if there was a realization of income incident to the freeing of the stock from the claims of the banks to such an extent that income may be computed, not on the cost but on the increased fair market value thereof, then it is the worst form of double taxation to again tax that same increase in value when the stock is on the same date sold. We submit that the maximum value which can be given to such stock in computing the profit on its being freed from the claims of creditors is its cost basis in the hands of the taxpayer. This leaves that same cost then as the appropriate basis to use in computing the profit on the sale of the stock, thus avoiding the double taxation of the same increment in value.

There are no cases decided by either the Board or the Courts in which any valuation in *excess of cost* has been used in computing income on such a release of assets. In the *Lakeland Grocery Co. v. Commissioner* case, 36 B. T. A. 289, the market value was less than the book value. In *L. D. Coddon & Bros. Inc. v. Commissioner,* 37 B. T. A. 393, *The Springfield Industrial Building Company v. Commissioner,* 38 B. T. A. 1445 and *Dallas Transfer and Terminal Warehouse Co. v. Commissioner,* 70 Fed. (2d) 95, the property having depreciated in value, the Board or Court used such depreciated value resulting in a figure *less* than cost. But in no case has the income as the result of such a transaction been computed at a valuation in excess of book value or cost.

III. USING COST AS THE PROPER VALUATION OF THE ASSETS FREED, PETITIONERS DID NOT RECEIVE ANY TAXABLE INCOME INCIDENT TO THE RELEASE OF SUCH ASSETS AND THE CANCELLATION OF INDEBTEDNESS.

The authorities are clear that a taxpayer will receive taxable income incident to a cancellation of indebtedness and release of assets only if he is *solvent* after the cancellation.

Lakeland Grocery Co. v. Commissioner, 36 B. T. A. 289;

Madison Railways Company v. Commissioner, 36 B. T. A. 1106.

Using cost figures as a basis, the taxpayers were *insolvent* after the cancellation of indebtedness as well as before.

MR. SWAN

ASSETS

Current Assets:		
Due from Sherwood Swan and Company, Ltd.		$ 9,835.12
Investments:		
500 shares Sherwood Swan and Company Ltd. stock at cost	$ 50,000.00	
Madera County Ranch	10,000.00	60,000.00
		$ 69,835.12

LIABILITIES

Current Liabilities:		
Notes Payable—		
Bank of America—secured by first mortgage on ranch situated in Madera County, California (contra)	$ 10,000.00	
Central Company (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne totaling $20,000)	10,000.00	
Anglo California National Bank (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne in the respective total sums of $175,000 and $5,000)	90,000.00	
David S. Wasserman	5,000.00	$115,000.00
Accounts Payable—		
Helen L. Swan	4,788.00	
Charles Raphael	500.00	
Harry Camp	7,500.00	
Orrick, Palmer & Dahlquist (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne totaling $2,000)	1,000.00	
T. E. Louis	725.10	
R. L. Underhill	200.00	
George D. Roberts	500.00	
McKinstry, Haber & Pierce Coombs	300.00	
Moose Club	58.50	15,571.60
Accrued taxes—		
Federal income taxes on 1936 income except that on sale of Sherwood Swan and Company, Ltd. stock and alleged gain on discharge of bank indebtedness	620.78	
California state income taxes on 1936 income accrued to December 16, 1936 (based upon same inclusions as federal tax)	143.57	764.35
Sherwood Swan—Net Insolvency		*61,500.83*
		$ 69,835.12

MR. WHITTHORNE

ASSETS

Investment:		
Sherwood Swan and Company, Ltd. capital stock—500 shares—at cost..		$ 50,000.00

LIABILITIES

Current Liabilities:		
Notes Payable—		
Central Company (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne totalling $20,000)	$ 10,000.00	
Anglo California National Bank (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne in the respective total sums of $175,000 and $5,000)	90,000.00	100,000.00
Accounts Payable—		
Orrick, Palmer & Dahlquist (one-half of joint indebtedness of Sherwood Swan and W. R. Whitthorne totalling $2,000)	1,000.00	
George D. Roberts	500.00	1,500.00
W. R. Whitthorne—Net Insolvency...		*51,500.00*
		$50,000.00

Since the taxpayers were thus insolvent after the transaction, they received no taxable income by reason of the cancellation of indebtedness.

IV. ANY INCOME TO PETITIONERS INCIDENT TO THE RELEASE OF ASSETS OCCASIONED BY THE CANCELLATION OF INDEBTEDNESS CANNOT EXCEED THE NET FAIR MARKET VALUE OF THE ASSETS SO RELEASED.

We have demonstrated under point II that the cost to taxpayers of the Sherwood Swan and Company stock is the maximum amount which may be used in determining whether or not the taxpayers received any income incident to the cancellation of indebtedness and freeing of assets, and we have shown under point III that applying this rule the taxpayers did not receive any taxable income incident to the transaction. But even if we depart from this cost basis and consider the fair market value of the asset at the time of the cancellation, still the taxpayers did not receive any income. The Commissioner has entirely ignored any consideration of the valuation of the assets freed and has computed his alleged profit on the full amount of the cancelled indebtedness—$80,009.13 in the case of Swan, and $35,040.66 in the case of Whitthorne.

We propose to show that the maximum amount which he may use is the net fair market value of the freed assets in the hands of the taxpayer on December 16, 1936 after deducting his continuing indebtedness.

In the *Lakeland Grocery Co. v. Commissioner* case, 36 B. T. A. 289, the Board, without any particular discussion of whether the test should be cost or present fair market value, determined solvency and the amount of the profit realized on the basis of book value of assets and computed a profit of $39,596.93 on

that basis. However, we are advised by Mr. Robert Ash, attorney for the taxpayer in the *Lakeland Grocery Co.* case that his evidence before the Board showed the fair market value of the assets at the time of the transaction to be much less than book value and that rather than face an appeal the Commissioner settled for $1000 tax instead of the $7000 tax determined by the Board.

In all cases since the *Lakeland Grocery Company* case where there has been a shinkage in the value of assets the Board has used the fair market value at the time of the transaction rather than the larger book value.

Madison Railway Company v. Commissioner, 36 B. T. A. 1106. The taxpayer had among its assets street railways of the book value of $452,829.53, but which it was admitted had no real value in the tax years in question. The Board, in determining that the taxpayer was insolvent after the cancellation of indebtedness and therefore not subject to tax, took into consideration not the book value of the assets but the lesser fair market value obtained by eliminating this item from the assets.

Again in *The Springfield Industrial Building Company v. Commissioner,* 38 B. T. A. 1445, the Board in determining the insolvency of the taxpayer at the time of a settlement took into consideration the then reduced fair market value of real estate based upon the testimony of expert witnesses; that is to say, real estate which cost $110,500 was valued at only $70,000.

Using such reduced valuation the taxpayer was found to be insolvent.

Finally in *Dallas Transfer and Terminal Warehouse Co. v. Commissioner,* 70 Fed. (2d) 95 (5th C. C. A.), it was again the reduced fair market value of real estate assets to which the Court gave consideration.

We will proceed to ascertain the fair market value of Sherwood Swan and Company stock immediately after the settlement, and using such valuation, will determine the solvency of the taxpayers.

V. USING THE FAIR MARKET VALUE BASIS PETITIONERS DID NOT RECEIVE ANY TAXABLE INCOME INCIDENT TO THE RELEASE OF ASSETS FOR THE CANCELLATION OF INDEBTEDNESS.

Mr. Swan.

It can be shown that the market value of the Sherwood Swan and Company, Ltd. stock is evidenced solely by the $7 per share price at which the A stock was sold to the brokers. On this basis Mr. Swan had a net insolvency after the transaction of $10,500.83. See the table in statement of facts above, pages 7-8. We assign no market value to the Class B stock for the reasons set forth in Section VI of this brief, post.

Mr. Whitthorne.

In Mr. Whitthorne's case also the market value of the Sherwood Swan and Company, Ltd. stock is evi-

denced solely by the $7 per share price at which the A stock was sold to the brokers. Under this assumption Mr. Whitthorne had a net solvency of $3500. However, as we demonstrated under point II, the *maximum valuation* which may be placed upon property freed from creditors' claims is the *cost basis* thereof. *Fair market value* is to be taken into consideration only in the event that it is less than cost. Under Section III, supra, we showed that using the cost basis Whitthorne was insolvent.

VI. THE ENTIRE COST TO PETITIONERS OF THE SHERWOOD SWAN AND COMPANY STOCK SHOULD BE APPLIED AS THE BASIS FOR THE CLASS A PREFERRED STOCK SOLD BY THEM RATHER THAN SIMPLY AN ALLOCATED PERCENTAGE THEREOF.

As of December 16, 1936, there was a reorganization and recapitalization of Sherwood Swan and Company, Ltd. as the result of which the 1000 shares of its capital stock theretofore owned by Messrs. Swan and Whitthorne in equal proportions were called in and there were issued to them in lieu thereof 30,000 shares of Class A preferred stock of the par value of $10 each and 45,000 shares of no par value common stock.

Messrs. Swan and Whitthorne immediately entered into a contract of sale with brokers for the sale of 25,000 shares of the Class A preferred stock at $7 per share. They still own the remaining 5,000 shares —2,500 shares each.

There have been no sales of the 45,000 common stock and no offers or bids therefor. The only transaction

involving this stock was that in the spring of 1937 Mr. Whitthorne transferred 10% thereof or 4,500 shares of his one-half thereof to Mr. Swan in consideration of Mr. Swan assuming the full liability (that is, Mr. Whitthorne's as well as his own) on the balance of a $20,000 note to the Receiver of the Central Bank. This was not an "arm's-length" transaction. Witness Murphy computed the then present value of this liability at $8,618.48. (Exhibit 21.)

Under this state of facts this common stock had no fair market value as of December, 1936.

Clearly, the transaction above referred to between Messrs. Whitthorne and Swan was not a "market" transaction. It was not at arm's length. There were no other sales or offers or bids for the common stock. Since the common stock had no fair market value, the entire cost basis of the old stock should be assigned to the Class A preferred stock.

Axton v. Commissioner, 32 B.T.A. 613, is directly in point in this connection. The facts are almost identical. Petitioners owned old common stock. They received in exchange new Class A and Class B stock, retaining the Class B and selling the Class A to brokers. This sale of the Class A stock in the *Axton* case, as in the present one, had been prearranged as a part of the whole plan. In determining the profit to the petitioners on the sale of their Class A stock the Commissioner declined to assign all the cost of their old stock to the Class A and determined that $20.00 of such cost should be assigned to the Class B and only the balance thereof to the Class A. The Board reversed, saying:

"We find as a fact from a consideration of all of the evidence in this case that the class B stock had no fair market value and had no value, at the time it was received by these petitioners, on which a practicable allocation of the basis of the old shares could be made.

The above finding of fact for all practical purposes determines the real issue in the case. It will enable the parties to compute the tax liability of each petitioner under Rule 50. The fair market value of the Class A shares at the time received is clearly shown and is conceded to have been the price at which they were immediately sold. The gain which the petitioners realized upon the receipt of the Class A and Class B stock is the excess of the fair market value of the Class A stock over the basis of the old shares surrendered in the exchange. If that was a transaction from which no gain or loss was recognized for tax purposes, then the petitioners realized a gain from the subsequent sale of the Class A shares equal to the excess of the cash received over the basis of the old shares. Thus, no matter which gain is recognized, the amount of gain is exactly the same.

Not only is there no evidence to support the Commissioner's determination of a fair market value of $20 a share for the class B stock at the time it was received by these petitioners, but the evidence clearly shows that determination to have been erroneous. In order to hold that the Class B stock had no fair market value upon which a profit could be computed and no value upon which a practicable allocation of the old basis could be made, it is not necessary to believe that the class B stock was worthless. If anything is ever

realized from the disposition of it, the entire amount realized will be income to these petitioners. Cf. art. 58, Regulations 74. The class B stock in question probably had some value. It was all held by a small group of individuals who had been connected with the old corporation and who were expected to continue with the new corporation. None of this stock was bought or sold until long after the date in question, when conditions had materially changed. If the assets of the corporation could have been liquidated at their book value, about $8 would have been paid on each share of Class B stock. About 16 cents per share per year would be available for dividends on this class of stock if average earnings of the past were maintained. This stock had exclusive voting privileges so long as dividends on the other stock were not far in default. The parties agree that if a certain broker had been present to testify, he would have said he was familiar with the fair market value of the class B stock of the new corporation and that in his opinion it had a fair market value in 1928 in excess of $15 a share. There is some other evidence from which the respondent might argue that this stock had some fair market value. On the other hand, however, there is the fact that none of it was sold; there was strong probability that the large earnings of 1927 would not be repeated; before any dividends would be available to the Class B stockholders, earnings had to be used to pay $60,000 as dividends on preferred stock, to pay $160,000 as dividends on Class A stock and to set aside $50,000 annually as a sinking fund; several officers of the corporation testified that in their opinion the class B stock had no fair market value at the

time it was received by these petitioners; and there is other evidence to show that whatever small value the class B stock had in 1928 was most uncertain and highly speculative. The respondent sought witnesses to testify that the stock had a fair market value. Two of these witnesses, when called, failed to express an opinion that the stock had any fair market value. Consideration has been given to all of the evidence and it indicates with reasonable certainty that no figure can be satisfactorily fixed upon to represent the value of the class B stock at the time it was received by these petitioners. Under such circumstances the entire old basis should be recovered out of the proceeds and the excess taxes as income as received."

In commenting on this case in a supplement to their work on the Law of Federal Income Taxation, Paul & Mertens say in Section 18.112:

"Where several classes of stock are received in exchange, and stock of one class has no fair market value or no value on which a practical allocation of the basis of the old shares may be made, the entire old basis may be allocated to securities of the other class.

"The conclusion expressed in the text was reached by the Board, notwithstanding that the securities in question had a book value of about $8.00 per share, and had exclusive voting privileges; there was also some evidence to the effect that the stock was worth $15.00 per share. As a statement of general principles the finding of the Board in this case seems sound. In case of doubt as to the value of the several classes of securities received, it seems desirable to apply the entire

cost against the securities which have a definite market value, particularly where those securities are the first sold. In such a case the government is not apt to be substantially injured because the net result is merely a postponement of the tax."

Similarly in the case now before the Court for consideration, the entire cost of the old basis should have been used as the basis in computing the profit on the sale of the A stock to the brokers. The Board of Tax Appeals made no finding on this issue. It referred to it in paragraph 2 of its opinion, but that of course is not a substitute for a finding of fact. *Commissioner v. Bonwit Teller & Co.,* 87 Fed. (2d) 764.

VII. THERE WAS REASONABLE CAUSE FOR THE APPARENT ONE-DAY DELAY OF PETITIONERS IN THE FILING OF THEIR RETURNS.

The Commissioner assessed a 5% penalty against the taxpayers, contending that they were negligent in filing their tax returns for the year 1936 one day late.

The commissioner had by two extension of time extended the time to file the returns to June 1, 1937.

The only evidence introduced by the Commissioner was the introduction in evidence of the filed return of taxpayer Swan (Respondent's Exhibit B) which shows the Collector's Stamp—"June 2nd, 1937". The Commissioner did not introduce any supporting evidence as to the signifiance of this date stamp;—that is as to whether he contends that it marked the date on which the return was filed with the collector. There

is no showing as to whether it was placed on the return by the deputy collector in Oakland where it was filed or whether it was subsequently placed thereon in the collector's main office in San Francisco to which it was subsequently transmitted.

We respectfully submit that the Court should grant taxpayers relief from this penalty based on the following facts testified to by Messrs. Short and Swan. The returns which involved the statement of the various issues which have been heretofore discussed were worked on by Mr. Short (Mr. Swan's accountant) for many weeks. In the course of such work he prepared a twelve-page memorandum setting forth the history of the dealings in the stock of Sherwood Swan and Company, Ltd., a copy of which was attached to each of the four returns. The returns showed no tax due from Mr. Swan or Mr. Whitthorne and a comparatively small tax due from their respective wives. The returns were delivered to Mr. Swan on June 1st—the last date. He had them notaried and late in the afternoon had his company draw a check in payment of the first half of Mrs. Swan's tax and went to the office of the Collector of Internal Revenue in the Oakland Post Office. He did not realize that the office closed as early as 4:00 o'clock, believing it was open until 5 o'clock. Not being able to enter the office, he deposited the returns by slipping them through the mail slot in the office door. All this took place on June first. The Commissioner has not countered with any evidence as to when the collector placed his June second stamp thereon.

If Mr. Swan had mailed the returns in the Oakland Post Office Building late in the afternoon of June first addressed to the collector's office in that same building, that would have been a sufficient filing within the terms of Regulation 103, Section 19.53-4. Certainly his actual delivery of the returns to the collector's office instead of relying on the mail to deliver them for him can be no less effective.

The stamping of the return creates only a presumption that that was the date of its filing and such presumption is rebuttable by oral evidence. See *Perkins v. Commissioner,* 33 B. T. A. 606 at page 616. See also *Edwards v. Grand,* 121 Cal. 254, where the Court said:

> "The contention of the appellant that, inasmuch as the mortgage was delivered to the recorder after the hour for closing the office, it cannot be deemed to have been filed for record until the hour for opening the office on the next morning, is untenable. We are cited to no authority in support of the proposition that an instrument can be properly filed only within the hours fixed by statute for keeping the office open. These hours are established for the purpose of defining a duty of the officer, and for the convenience of the public, and are not to be construed as limiting the time within which individuals may avail themselves of rights elsewhere conferred by statute."

In *State National Bank v. Lowenstein* (Oklahoma), 155 Pac. 1127, the Court said:

> "The first contention, that the date of the filing mark in such a paper is not conclusive—and that

the actual date of the delivery of the instrument to the proper custodian controls, and that such delivery may be shown by parol evidence contradicting the filing mark, is too well settled to require citation of authorities."

We respectfully submit that Mr. Swan made an effort in good faith to file, and in fact did file, the returns on June first, and that relief should therefore be granted from the penalties.

CONCLUSION.

It is respectfully submitted that the Board of Tax Appeals should be reversed for the following reasons:

1. The 1000 shares of stock of Sherwood Swan and Company, Ltd., was freed from pursuit of the claims of the Bank creditors in 1930 for all amounts in excess of $200,000; $195,000 was paid to the Banks in 1936 so the only amount from which that stock was freed in 1936 was $5000.

2. The proper basis for considering the value of the assets freed from claims of creditors in connection with a cancellation of indebtedness is the cost basis to the debtor; using such cost basis, each of these debtors was insolvent after the cancellation of indebtedness and therefore received no income as the result of such cancellation.

3. A debtor does not receive income incident to a cancellation of indebtedness and freeing of assets if, after the transaction the fair market value of his

assets is less than his continuing liabilities; using this standard each of these debtors was insolvent after the cancellation of indebtedness and therefore received no income as the result of such cancellation.

4. The common stock of Sherwood Swan and Company, Ltd., had no fair market value in December, 1936; therefore, the entire cost basis of the old Sherwood Swan and Company stock should be used as the basis of the new Class A preferred stock sold by Swan and Whitthorne in December, 1936.

5. Reasonable grounds have been shown to relieve the petitioners from penalty for one day's apparent delay in filing their returns.

Dated, Oakland, California,
July 29, 1942.

Respectfully submitted,
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